Nos. 14-1197, 14-1221

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DOVER ENERGY, INC., BLACKMER DIVISION,

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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Petitioner/Cross-Respondent	)	Nos. 14-1197, 14-1221
v.	)	
NATIONAL LABOR RELATIONS BOARD	)	
Respondent/Cross-Petitioner	)	Board Case No. 7-CA-094695

CERTIFICATE AS TO PARTIES, RULING, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for the National Labor Relations Board ("the Board") certifies the following:

A. Parties and Amici:

1. Dover Energy, Inc., Blackmer Division ("the Company") was the Respondent before the Board and is the Petitioner and Cross-Respondent before the Court.

2. The Board is the Respondent and Cross-Petitioner before this Court.

3. Thomas Kaanta was the charging party before the Board.

B. Rulings Under Review:

The Company is seeking review of a Decision and Order issued by the Board in case number 7-CA-094695 on September 17, 2014, and reported at 361 NLRB No. 48.

C. Related Cases:

None.

s/Linda Dreeben
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Dated at Washington, DC
This 26th day of March 2015

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the petition of Dover Energy, Inc., Blackmer Division ("the Company") for review, and the cross-application of the National Labor Relations Board ("the Board") for enforcement, of a Board Decision and Order issued against the Company on September 17, 2014, and

reported at 361 NLRB No. 48.[1] The Board had jurisdiction over the unfair-labor-practice proceedings below under Section 10(a), 29 U.S.C. § 160(a), of the National Labor Relations Act, as amended ("the Act"), 29 U.S.C. §§ 151, et seq. The Board's Order is final under Section 10(e) of the Act, 29 U.S.C. § 160(e).

The petition for review, filed on October 10, 2014, and the cross-application for enforcement, filed on October 31, were timely as the Act places no time limit on either filing. This Court has jurisdiction over the petition and cross-application pursuant to Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f).

APPLICABLE STATUTES

Section 7 of the Act, 29 U.S.C. § 157:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective-bargaining or other mutual aid or protection . . . .

Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1):

> It shall be an unfair labor practice for an employer--
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.

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[1] "A." refers to the Deferred Appendix, "Tr." to the transcript of the hearing before an administrative law judge, and "Br." to the brief of Dover Energy, Inc., Blackmer Division. Where applicable, references preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

Section 10(e) of the Act, 29 U.S.C. § 160(e):

> . . . No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. . . .

STATEMENT OF THE ISSUE PRESENTED

Section 8(a)(1) of the Act prohibits employers from interfering with employees' union or protected activity. Does substantial evidence support the Board's finding that the Company's verbal warning unlawfully threatened union steward Thomas Kaanta with discipline if he engages in union and protected activities in the future?

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

This unfair-labor-practice case came before the Board on a complaint issued by the Board's General Counsel, pursuant to charges filed by company employee and union steward Thomas Kaanta. (A. 18.) The complaint alleged that the Company had violated Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), by threatening to discipline Kaanta for engaging in future union and protected activities, and had violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. § 158(a)(3) and (1), by giving him a verbal warning. (A. 19.) Following a hearing, an administrative law judge issued a bench decision on December 24, 2013, recommending that the Board dismiss the complaint. (A. 20.) The General

Counsel excepted to the dismissal of the Section 8(a)(1) allegation before the Board.[2] On September 17, 2014, the Board issued a Decision and Order reversing the judge and finding that the Company had violated Section 8(a)(1) by threatening to discipline Kaanta if he engaged in future union and protected activities. (A. 15.)

II. THE BOARD'S FINDINGS OF FACT

A. Background

The Company manufactures liquid-transfer pumps at its facility in Grand Rapids, Michigan. Since 1941, Auto Workers Local Union No. 828 ("the Union") has represented a unit of the Company's production and maintenance workers. Kaanta has worked for the Company for thirty-five years, and has held a journeyman position in the machine-repair shop for the past eight years. (A. 14; A. 171, Tr. 20-21.) In June 2012, Kaanta was elected to serve as a union steward. (A. 14, 18; A. 171, Tr. 20-26.) As a steward, he was responsible for investigating and processing grievances on behalf of the Union, duties which include requesting relevant information from the Company. (A. 14, 18; A. 173, 191, 197, Tr. 26, 98-99, 122-23.)

During the summer of 2012, the Company and the Union were in the process of negotiating a successor collective-bargaining agreement. Union President

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[2] The General Counsel did not challenge the judge's dismissal of the allegation that the warning itself violated Section 8(a)(3) and (1). (A. 14 n.2.)

Dennis Raymond led the Union's bargaining committee, which represented the bargaining unit at the negotiating table. (A. 14, 18; A. 186 ,193, Tr. 78, 107-09.) Kaanta was not a member of the bargaining committee, but he believed that Raymond was a part-owner of a machine shop that performed subcontracted work for the Company, and was concerned about potential conflicts of interest that could affect the contract negotiations. (A. 14, 18; A. 174, Tr. 31-32.)

B. Kaanta Submits Two Information Requests to the Company

On June 12, 2012, Kaanta presented a written information request to the Company's Director of Human Resources, John Kaminski. The request sought information about "any and all financial relationships outside the collective-bargaining agreement" between the Company and union "members, reps, pensioners, spouses, and immediate children." (A. 14, 18; A. 91.) It stated that the information was "for the purpose of future bargaining." (A. 14, 18; A. 91.)

Kaminski accepted the request and said he would review it. (A. 14, 18; A. 173, 186, Tr. 28-29, 81.) He then asked Raymond whether the Union had authorized the request. Raymond said the Union had not, and that Kaminski should not provide the information. (A. 14; A. 186-87, Tr. 81-82.) On June 19, Kaminski sent Kaanta a letter denying the request. The letter stated: "Any requests must be processed through the normal bargaining committee process for bargaining and may or may not be disclosed as the company determines. You are

not part of the negotiation committee and your request is outside your scope." (A. 14, 19; A. 92.) Kaanta did not file a grievance over the Company's failure to provide the requested information, and he and Kaminski did not discuss the matter further. (A. 14, 19; A. 175-76,187, Tr. 36-38, 84.)

On August 10, Kaanta submitted a second written information request to Kaminski, seeking information about past and current employees' hours and pay. The request explained: "I believe the company is manipulating wage rates for the purpose of influencing the union vote! I request the information for labor board investigation." (A. 14, 19; A. 93.) Kaminski again contacted Raymond, who told him that the Union had not authorized Kaanta's request and that he should not respond to it. The Company did not provide the requested information. (A. 14, 19; A. 187, Tr. 84-85.)

C. The Company Threatens Kaanta with Discipline and Discharge

Kaminski and Kaanta met in Kaminski's office on August 23, 2012. (A. 14, 19; A. 177, 188, Tr. 42, 87.) During that meeting, Kaminski handed Kaanta a document titled "Verbal Warning," which stated:

> This is to serve as a verbal warning for continued frivolous requests for information (photocopies of all employee paychecks for a period ending December 1, 2007 and pay period August 5, 2012 and spreadsheets for total hours and pay for each pay period starting with August 12, 2012, and every pay period thereafter, until the contract is ratified) and interfering with the operation of the business. You are not on the Bargaining Committee and fail to work within the

> parameters of such to bring matters to the Bargaining Committee. We are not individually bargaining with you or any other individual.
>
> Similar requests such as this will result in further discipline up to and including discharge.

(A. 14, 19; A. 94.) When Kaanta read the warning, he asked Kaminski, "[y]ou mean if I ask more questions, I could be fired?" (A. 178, Tr. 46-47.) Kaminski did not answer, he just shrugged his shoulders. (A. 178, Tr. 46-47.) Kaanta has not made any more information requests. (A. 184, Tr. 70.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On September 17, 2014, the Board (Chairman Pearce and Member Hirozawa; Member Miscimarra, dissenting) found that the Company violated Section 8(a)(1) of the Act by issuing a warning that would reasonably be understood as threatening Kaanta with discipline if he engaged in future union and protected activities. (A. 14.)[3]

The Board's Order directs the Company to cease and desist from threatening employees with discipline for engaging in union or other protected activity and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their statutory rights. Affirmatively, the Board's

[3] Member Miscimarra agreed with the majority's framing of the legal issue but disagreed that the warning would reasonably be understood to threaten discipline for future protected activity. (A. 16.)

Order requires the Company to post a remedial notice at its Grand Rapids, Michigan facility. (A. 15-16.)

SUMMARY OF ARGUMENT

Ample evidence supports the Board's finding that the Company violated Section 8(a)(1) of the Act by threatening to discipline Kaanta if he engaged in future union and protected activities. Based on the language and context of the verbal warning, Kaanta would reasonably fear that any future request for employee wage or hour information would be considered "similar" enough to the one described in the warning to place him at risk of discipline or discharge. As the Board explained, Kaanta's responsibility as a steward to investigate contractual grievances could entail statutorily protected requests for those very types of information.

The Company's legal challenges misapprehend the Board's well-established standard for evaluating workplace communications under Section 8(a)(1). Contrary to the Company's assertions, a statement that would reasonably be understood to threaten an employee with discipline for engaging in union and protected activities in the future violates the Act regardless of whether it was precipitated by prior protected activity, and irrespective of the employer's motive or the employee's subjective reaction. Finally, the Company's arguments seeking to persuade the Court to read the warning differently from the Board merely show,

at best, that there may be another plausible interpretation of the document. The Company has not demonstrated that the Board's finding is either unsupported or unreasonable, as it must to overcome this Court's deference to the Board's fact-finding and reasonable inferences when interpreting workplace communications.

STANDARD OF REVIEW

The Board's findings of fact are conclusive if supported by substantial evidence in the record considered as a whole. 29 U.S.C. § 160(e); *see Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *accord Tasty Baking Co. v. NLRB*, 254 F.3d 114, 124 (D.C. Cir. 2001). Under the substantial-evidence test, a reviewing court may not displace the Board's choice between two fairly conflicting views, even if the court "would justifiably have made a different choice had the matter been before it de novo." *Universal Camera*, 340 U.S. at 488. When reviewing the Board's order, this Court grants deference to the Board's findings and the "'reasonable inferences' it draws from the evidence." *Cintas Corp. v. NLRB*, 482 F.3d 463, 468 (D.C. Cir. 2007). It "must uphold the Board's findings as long as they rest upon reasonable inferences, and may not reject them simply because other reasonable inferences may also be drawn." *Tasty Baking Co.*, 254 F.3d at 124-25. Finally, this Court will uphold the Board's legal conclusions if they are "reasonable and consistent with controlling precedent." *Cintas*, 482 F.3d at 468.

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(A)(1) OF THE ACT BY THREATENING DISCIPLINE FOR FUTURE PROTECTED ACTIVITY

Section 8(a)(1) of the Act prohibits employers from making statements that threaten employees with discipline if they engage in union or protected activity. As shown below, the Board reasonably found that Kaanta would reasonably understand the verbal warning he received as placing him at risk of discipline for making future protected information requests in the course of contractual grievance investigations.

A. Section 8(a)(1) of the Act Prohibits Employers from Threatening To Discipline Employees if They Engage in Union or Protected Activity

Section 7 of the Act, 29 U.S.C. § 157, grants employees the "right to self organization, to form, join, or assist labor organizations . . . and to engage in . . . concerted activities for the purposes of collective bargaining or other mutual aid or protection . . . ." It is well-established that Section 7 protects a union steward who aids another employee in filing, or otherwise processing, a grievance. *OPW Fueling Components v. NLRB*, 443 F.3d 490, 496 (6th Cir. 2006); *Slusher v. NLRB*, 432 F.3d 715, 722 n.3 (7th Cir. 2005); *Allied Aviation Fueling of Dallas*, 347 NLRB 248, 253 (2006) (citing *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 836 (1984)), *enforced*, 490 F.3d 374 (5th Cir. 2007). A union steward's

information requests made pursuant to a grievance investigation are, therefore, protected. *See Overnite Transp. Co.*, 343 NLRB 1431, 1437 (2004) (holding that employee who "was fulfilling his duties as union steward in gathering information for potential grievances" was "engaged in protected concerted conduct"); *see generally NLRB v. USPS*, 486 F.3d 683, 688 (10th Cir. 2007) (requesting information from management is one of steward's "basic union rights"); *DaimlerChrysler Corp. v. NLRB*, 288 F.3d 434, 442-43 (D.C. Cir. 2002) (employer has duty to provide information union may require "in order to perform its duties in grievance processing"). Furthermore, "information related to the wages, benefits, hours, and working conditions' of unit employees is presumptively relevant" to the "investigation and processing of grievances." *Brewers & Maltsters Local 6 v. NLRB*, 414 F.3d 36, 46 (D.C. Cir. 2005) (citing *DaimlerChrysler*, 288 F.3d at 443); *Pub. Serv. Elec. & Gas Co.*, 323 NLRB 1182, 1186 (1997), *enforced*, 157 F.3d 222 (3d Cir. 1998).

Section 8(a)(1) of the Act implements Section 7 by making it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7]." 29 U.S.C. § 158(a)(1). An employer's statement violates Section 8(a)(1) if, "considering the totality of the circumstances, the statement has a reasonable tendency to coerce or to interfere with those [Section 7] rights." *DaimlerChrysler*, 288 F.3d at 444; *Ellison Media*

Co., 344 NLRB 1112, 1113 (2005). Accordingly, statements that threaten retaliation against employees because of their participation in union or other protected activity—which includes making information requests in furtherance of grievance investigations—violate Section 8(a)(1). *See Ark Las Vegas Rest. Corp. v. NLRB*, 334 F.3d 99, 106 (D.C. Cir. 2003); *DaimlerChrysler*, 288 F.3d at 444; *Tasty Baking Co.*, 254 F.3d at 124. That is equally true when the employer's statement warns employees of adverse consequences for their future protected conduct. *See DaimlerChrysler*, 288 F.3d at 444 (unlawful for employer to "threaten discipline for any future" protected activity); *Parexel Int'l*, 356 NLRB No. 82, 2011 WL 288784, at *5 (2011) ("[T]he Board has often held that an employer violates the Act when it acts to prevent future protected activity.").

The test for assessing a statement's tendency to interfere with employee rights in violation of Section 8(a)(1) is objective: the employer's motive in making the statement is irrelevant to the analysis, and proof that the employee was actually coerced is not necessary. *Exxel/Atmos, Inc. v. NLRB*, 147 F.3d 972, 975 (D.C. Cir. 1998); *Itt Fed. Servs. Corp.*, 335 NLRB 998, 1003 n.14 (2001). Instead, the test asks how the employer's statement would reasonably be understood. *Itt Fed.*, 335 NLRB at 1002; *accord Tasty Baking Co.*, 254 F.3d at 124; *Exxel/Atmos*, 147 F.3d at 975; *Ellison Media*, 344 NLRB at 1113 (applying reasonable employee test and finding employer's statement unlawfully coercive).

B. Kaanta Would Reasonably Understand the Verbal Warning as Placing Him at Risk of Discipline for Future Protected Information Requests in the Course of His Contractual Grievance Investigations

Substantial evidence supports the Board's finding (A. 15) that Kaanta would reasonably construe the Company's verbal warning to proscribe his future protected activity. That finding is based on both the language of the warning and the fact that the Company issued it to an employee whose role as a union steward included grievance-processing responsibilities.

The Company's warning referenced Kaanta's second information request. Specifically, when defining "frivolous requests for information," the warning described the wage and hour data that second request sought: "photocopies of all employee paychecks for a period ending December 1, 2007 and pay period August 5, 2012 and spreadsheets for total hours and pay for each pay period starting with August 12, 2012, and every pay period thereafter, until the contract is ratified." (A. 14-15; A. 94.) And the warning informed Kaanta that "[s]imilar requests such as this will result in further discipline up to and including discharge." (A. 15; A. 94.) Based on the language of the warning, the Board thus drew a logical inference (A. 15) that Kaanta would reasonably understand that future requests for information about employee hours and pay "could trigger the warning's threat of discipline or discharge."

The context of the warning, which was issued to a union steward responsible for investigating grievances, reinforces the Board's further determination (A. 15) that Kaanta would reasonably fear discipline even for certain protected information requests. Employee wage and hour information is a common subject of protected, grievance-related information requests. *See supra,* p. 11. Accordingly, as the Board explained (A. 15), Kaanta could well make protected requests for information similar to the information detailed in the warning, for the purpose of investigating contractual grievances pursuant to his representational duties. In sum, both the language and the circumstances of the verbal warning support the Board's conclusion that the Company's warning tended to interfere with Kaanta's right to engage in future union and protected activity, in violation of Section 8(a)(1).

Moreover, the Board's interpretation of the verbal warning is consistent with governing precedent. The Board and this Court have recognized that employers' use of vague descriptors to define sanctionable conduct may render employer threats or restrictions overbroad, leading employees reasonably to interpret those workplace communications as restricting future protected activity. That is particularly true where, as here, other language in the communications, or the circumstances of their issuance, support such an interpretation. *See*, *e.g.*, *DaimlerChrysler*, 288 F.3d at 441, 444 (employer's "overly broad" threat to

discipline union steward for making further "inappropriate" or "over-burdening" information requests could be read as covering "any future request for information," thus interfering with steward's representational duties); *Aroostook Cnty. Reg'l Ophthalmology Ctr. v. NLRB*, 81 F.3d 209, 215 (D.C. Cir. 1996) (requirement that employees cease "gossiping and complaining" amongst themselves and instead bring complaints to particular manager was "obvious" restriction of Section 7 rights); *Ellison Media*, 344 NLRB at 1118 (employer's orders to stop "gossiping" and discussing "this situation" were unlawful where reasonably understood to refer to employees' continued discussion of supervisor's sexually suggestive comment). Here, the Company's threat of discipline for "frivolous" requests for information and "interfering with the operations of the business" are undeniably broad. In addition, the parenthetical list of employee pay and hour information in the warning strongly implies that the Company will define requests for such (typically protected) information as meeting those criteria for discipline. Kaanta's status as a union steward makes that clear implication more immediately relevant and threatening.

C. A Threat To Discipline Future Protected Activity Violates the Act Regardless of Whether it was Precipitated by Protected Activity

There is no merit to the Company's suggestion (Br. 22-23) that the Board can or should find an unlawful threat in violation of Section 8(a)(1) only after an

employee has engaged in protected or union activity. As noted, well-established Court and Board precedent holds that an employer violates the Act when it interferes with an employee's future protected activity, and a statement may be unlawful because it interferes with or threatens future protected activity. *See DaimlerChrysler* and *Parexel*, *supra* p. 12; *see, e.g.*, *S. Jersey Sanitation Corp.*, 357 NLRB No. 124, 2011 WL 6433569, at *7 (2011) (employer unlawfully threatened employees or conveyed message that protected activity would be futile by suggesting that former employee had been fired for union activity and that other employees would risk same fate if they engaged in similar conduct); *Parexel*, 2011 WL 288784, at *8 (employer unlawfully discharged employee to prevent her from exercising her Section 7 rights, even assuming she "had not yet engaged in protected concerted activity at the time of her discharge"). An employee thus need not have already engaged in protected activity in order for an employer's threat with respect to future protected activity to be unlawfully coercive.

Indeed, the workplace-rule precedent the Company cites (Br. 19-25) represents a broad category of unfair labor practices based on employer interference with employees' future protected conduct, regardless of whether the employees have engaged in protected activity in the past. For example, if employees would reasonably construe a workplace rule to restrict their future protected activity, "the Board is under no obligation to consider whether the

disputed restriction has ever been enforced against employees exercising their section 7 rights." *Cintas Corp*, 482 F.3d at 468; *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998) ("Where the rules are likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement."), *enforced mem.*, 203 F.3d 52 (D.C. Cir. 1999).

While the rule cases therefore provide a helpful analogy supporting the Board's Order, the Company is wrong in suggesting (Br. 24) that the Board has inappropriately "shoehorn[ed] this case into its framework for evaluating whether a neutral work rule or policy violates Section 8(a)(1)." As described above, the Board applied the one, well-established, objective test for determining whether an employer has interfered with its employees' Section 7 rights in violation of Section 8(a)(1)—namely, "[w]hether the employer engaged in conduct, which, it may be reasonably said, tends to interfere with the free exercise of employee rights under the Act." (A.15 (quoting *Itt Fed.*, 335 NLRB at 1002.) To determine whether that standard was met, the Board examined the verbal warning, as it does other alleged workplace threats and certain workplace rules, to determine whether it "would reasonably be understood to proscribe future protected activity."[4] (A. 15.)

[4] A workplace rule may be unlawful because it expressly restricts protected activity, is promulgated in response to protected activity, or is applied to restrict protected activity. *See Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647

In any event, contrary to the Company's assertion (Br. 4, 20), the Board expressly declined (A. 15 n.4) to decide whether Kaanta's information requests prior to the verbal warning were unprotected. Consistent with governing precedent, the Board found resolution of that question "unnecessary" to its determination that the Company had unlawfully threatened discipline for *future* protected activity. Moreover, the Section 8(a)(3) allegation was not before the Board, so the Board did not, as the Company contends (Br. 20), implicitly find the requests unprotected by failing to find a Section 8(a)(3) violation.

D. The Company Fails To Show That the Board's Interpretation of the Warning is Unreasonable, Much Less Unfounded or Indefensible

In arguing (Br. 16-19) that the Board's findings are not reasonably defensible, the Company disregards key language in the verbal warning and context in which the warning was issued. In addition, the Company relies on immaterial evidence and inapposite cases. Accordingly, it fails to demonstrate any valid basis for rejecting the Board's interpretation of the verbal warning.

The Company's contention (Br. 17) that the Board focused solely on the portion of the verbal warning that threatened discipline for "similar requests such

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(2004). Because workplace rules are essentially threats—carrying either explicit disciplinary consequences or an implicit requirement of compliance to retain employment—they may also be unlawful if "employees would reasonably construe the language to prohibit" protected activity. *Id.*

as this" is incorrect. As discussed above (*supra*, pp. 13-15), the Board also pointed (A. 15) to the language in the warning specifically describing the documentation about employees' hours and pay that Kaanta sought in his second information request. It further noted that Kaanta could seek such information in furtherance of his protected representational duties as steward.

Indeed, in constructing its interpretation of the verbal warning, it is the Company (Br. 18-19) that ignores the critical language and context cited by the Board. Yet it was the Company that chose to include that critical language by specifically listing Kaanta's request for wage and hour information when defining "frivolous requests for information." And it chose to do so when warning a union steward—with grievance-processing responsibilities—that "similar requests such as this will result in further discipline up to and including discharge." (A. 94.) Conversely, the Company did not choose to list, or otherwise mention, the information Kaanta had sought in his first request. That omission is at odds with the Company's current insistence (Br. 18) that the warning's reference to "similar requests such as *this*" was actually meant to describe *both* of Kaanta's earlier requests. (A. 94 (emphasis added).)

Additionally, there is no merit to the Company's argument (Br. 19-21) that Kaanta must have known that the warning against making "similar requests" cautioned him only about submitting further "frivolous" information requests

unrelated to grievance processing because his prior information requests were not grievance-related.[5] "Similar," however, does not mean "identical," and Kaanta could have reasonably understood future requests for wage and hour data to be "similar" enough to the one described in the warning to trigger discipline. And Kaminski's noncommittal shrug in response to Kaanta's question after Kaminski delivered the warning—"you mean if I ask more questions, I could be fired?"—did nothing to clarify the Company's purported intention to restrict only clearly unprotected and unauthorized requests. Moreover, to the extent that the warning may suggest that a request must also be "frivolous" to qualify as "similar," that qualification is highly subjective and particularly chilling in the circumstances of this case: Kaanta's grievance-processing responsibilities would potentially put him in an adversarial relationship with the very company officials whose definition of "frivolous" he would need to avoid in order to steer clear of the threat of discipline or discharge.

[5] The Company's assertion that "there is no evidence that [Kaanta] ever submitted another information request during his 35 years of employment at Blackmer" misses the mark. (Br. 14.) At the time this case arose, Kaanta had been serving in his capacity as a union steward for less than two years. (A. 14-15, 18; A. 172-73, Tr. 25-26.) The fact that he had not submitted information requests in the decades before assuming that role is irrelevant. And his failure to submit any requests following the warning, which he could reasonably have understood as threatening adverse consequences for such requests, adds nothing to the Company's argument.

In sum, the factors supporting the Board's cogent reading of the warning undercut the Company's interpretation of "similar," "frivolous," and the warning as a whole. To the extent the Company's arguments may indicate that the verbal warning is susceptible to alternate plausible interpretations, any such ambiguity must be construed against the Company as the author of the warning. *See Itt Fed.*, 335 NLRB at 1003 (employer runs risk that "any ambiguity in his statement [] could be construed by an employee as containing an unlawful threat"); *see also Lafayette Park*, 326 NLRB at 828 ("[E]ven if the rule could be considered ambiguous, any ambiguity in the rule must be construed against the [employer] as the promulgator of the rule.").

Finally, and contrary to the Company's arguments (Br. 21-25), the Board's interpretation of the verbal warning is neither inconsistent with the record nor "speculative." As an initial matter, the Company's argument (Br. 22, 25) that the Board's interpretation of the verbal warning does not comport with record evidence of either Kaminski's motive in issuing the warning or of the warning's apparent effect on Kaanta, is legally inapposite. As discussed above (*supra* p. 12), and as the Board explained (A. 15 n.4), "neither party's motives are relevant to the 8(a)(1) allegation."

Nor, contrary to the Company's arguments (Br. 21-25), are the Board's findings speculative. Rather, they are based on reasonable inferences drawn from

the specific language and context of the warning.[6] The Company's reliance (Br. 21-25) on *Aroostook County Regional Ophthalmology Center v. NLRB*, 81 F.3d 209 (D.C. Cir. 1996), in particular, is unconvincing. The Court's critique of the Board's rationale in that case depended on very specific countervailing language and circumstances, both of which are notably absent here.

The Court in *Aroostook* held, for example, that employees would not reasonably understand a rule barring discussion of "office business" to prohibit discussion of terms and conditions of employment when the rule was placed in "the last sentence of a long discussion regarding patient confidentiality in which the term 'office business' [was] used to refer to confidential patient medical information." 81 F.3d at 211, 213; *see also Adtranz ABB Daimler-Benz Transp., N.A. v. NLRB*, 253 F.3d 19, 23, 28 (2001) (handbook solicitation rule not reasonably read as restricting protected solicitation during non-work time when handbook specified intent to avoid work disruption and rule applied only on

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[6] Entirely speculative, however, is the Company's contention (Br. 26-27) that enforcing the Board's Order, an unremarkable application of well-established legal standards, would have an unprecedented impact on employers. *See Cintas*, 482 F.3d at 469 (rejecting employer's "parade of horribles" when holding ban on disclosure of "confidential information," including "any information concerning" employees, would unlawfully restrict protected discussion of terms and conditions of employment). Moreover, the Board did not hold that the warning unlawfully disciplined Kaanta's prior requests. (A. 14 n.2.) Accordingly, even assuming those requests were burdensome, as the Company asserts, its suggestion that the Board's decision would prevent employers from disciplining burdensome requests is divorced from the facts of this case.

company premises and during working time).[7] Here, by contrast, nothing in the warning clarifies that "frivolous" or "similar" requests exclude protected requests for wage and hour data in furtherance of grievance investigations. Moreover, the Company listed wage and hour data—which is generally protected as information relevant to terms and conditions of employment—when defining "frivolous" and warning Kaanta not to submit "similar requests" in the future. (A. 15; A. 96.)

Aroostook also rejected as unfounded the theory that a rule barring grievance discussions "within earshot of patients" would restrain employees from any grievance discussions at all for fear they might be overheard. 81 F.3d at 211, 213. In doing so, it emphasized the well-established prerogative of healthcare employers to protect patients from disturbance and relied on record evidence that employees had ample opportunities to engage in discussions away from patients. *Id.* Here, the prospect that future protected activity would fall within the warning's proscription is inherent in both the nature of the information the warning specifies and the representational responsibilities of the employee to whom the Company issued the warning. In particular, it is not speculative to predict that a union

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[7] The Company also cites (Br. 25) *World Color (USA) Corp. v. NLRB*, ___ F.3d ___, 2015 WL 221054 (D.C. Cir. Jan. 16, 2015) as supporting its argument that the Board's analysis is speculative. That case is totally inapposite because the Board's decision turned on another prong of the unlawful-rule standard announced in *Lutheran Heritage*, *supra* n.4, and did not examine how employees would understand the rule. *Id.* at *2 (remanding to Board to consider remainder of *Lutheran Heritage* test).

steward, elected by fellow employees to investigate and process their grievances, may carry out those representational duties by making protected information requests about employee pay and hours in the future. Indeed, the undisputed facts show that Kaanta's duties as a union steward require him to process grievances in accordance with the Company's collective-bargaining agreement, and that requesting information from the Company is an integral aspect of grievance investigations. (A. 1, 18; A. 190-91, 197, Tr. 97-99, 122-23.)

In essence, the Company's arguments boil down to an attempt to persuade this Court that, at best, there may be another plausible interpretation of its disciplinary threat. Even so, the Company has not shown—as it must for this Court to deny enforcement of the Board's Order—that the Board's interpretation and inferences are unsupported or unreasonable. This Court recognizes "'the Board's competence in the first instance to judge the impact of utterances made in the context of the employer-employee relationship.'" *Ark Las Vegas*, 334 F.3d at 106 (quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 620 (1969)). In this case, the Board's interpretation of the warning as interfering with Kaanta's future union and protected activities is supported by substantial evidence and reasonable inferences, and is consistent with controlling precedent.

CONCLUSION

For the foregoing reasons, the Board respectfully submits that the Court should enter a judgment denying the Company's petition, granting the Board's cross-application, and enforcing the Board's Order in full.

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DOVER ENGERY, INC., BLACKMER DIVISION,	)	
Petitioner/Cross-Respondent	)	Nos. 14-1197, 14-1221
v.	)	
NATIONAL LABOR RELATIONS BOARD	)	
Respondent/Cross-Petitioner	)	Board Case No. 7-CA-094695

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 5,588 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2007.

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Dated at Washington, DC
this 26th day of March, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on March 26, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I certify the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they a registered user or, if they are not by serving a true and correct copy at the address listed below:

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